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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 653

BERNARD EVERETT KLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 128-130) [1] is reported at 210 F. 2d 215.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1954 (R. 130). On February 20, 1954, Mr. Justice Jackson entered an order extending the time for filing a petition for a writ

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[1] The record in this case is contained in two volumes, one running from page 1 to 131 and the other, from page 1a to 151a.

of certiorari to and including March 24, 1954 (R. 131), and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the fact that the grand and petit jury panels were drawn from inhabitants of the county in which petitioner was tried, rather than from the whole district of 29 counties deprived petitioner of a representative jury and whether such objection can be raised six months after the judgment of conviction.

2. Whether the trial court's denial of petitioner's motion to inspect certain documents and for a delay in the commencement of the trial constituted denial of due process of law and effective representation of counsel.

3. Whether the trial court's instruction that a reasonable doubt was a doubt for which you could give a reason was reversible error.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to

be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

18 U.S.C. (Supp. V) 1005 provides, in relevant part, that:

* * * * *

Whoever makes any false entry in any book, report, or statement of such bank [2] with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

On June 1, 1951, a two-count indictment was returned against the petitioner, Bernard Everett Klock, in the United States District Court for the Northern District of New York, charging him with having on two separate occasions made a false and fictitious entry in the books of the Syracuse Trust Company (a bank insured by the Federal Deposit Insurance Corporation) with the intent to injure and defraud the Syracuse Trust Company, and to deceive its officers and the examiners appointed to

[2] The term "such bank" includes member banks of the Federal Reserve System and banks insured by the Federal Insurance Corporation.

examine its affairs (R. 4a-6a). The petitioner pleaded not guilty (R. 1a).

Just prior to the trial on this indictment, on January 8, 1952, petitioner filed motions for a continuance of the trial from its scheduled date of January 14, and to be allowed to inspect the minutes of his appearance before the grand jury which had returned the indictment against him. The basis for his motion for continuance was that he had been notified by the United States Attorney that certain companion cases, which involved misapplication and conspiracy to misapply the bank's funds, would be tried before his case. As a consequence, his counsel had not retained trial counsel, but had expected to receive assistance from the counsel trying the companion cases (R. 15a-17a). The affidavit of newly retained trial counsel that he needed time to prepare for trial was attached (R. 10a-13a). The additional request, for inspection of the grand jury minutes, and for certain bank records in the control of the prosecutor, was based on the allegation that they were required in the preparation of his defense and on the petitioner's desire not to vary from his grand jury testimony (R. 19a-23a).

Both motions were denied. It appears that the shift in the order of trial of the Syracuse Bank cases resulted from the illness of one of the codefendants in one of the other cases (R. 3).

At the trial, the Government introduced evidence that the petitioner, as assistant head bookkeeper of the Syracuse Trust Company, had charge of the processing of checks drawn on the bank and pre-

sented to it for collection. Several F.B.I. agents then testified that the petitioner had told them that he had, over a period of at least three years, authorized the honoring of certain checks although the accounts on which they were drawn did not at the time have sufficient funds; and that in order to prevent the discovery of this, he had taken the checks to his home with him; and, in addition, in 1950, had made entries to the accounts of the Easy Washing Machine Company and the Carrier Corporation showing withdrawals and deposits which were never reflected on the bank statements sent to those companies (R. 75, 77-78, 87-88).

Petitioner testified in his own behalf. He admitted making the entries charged, but said that he did it "in order to protect the bank itself and the bank's standing in the community and the officers involved * * *" (R. 58a, 60a). He claimed that he had acted pursuant to instructions from bank officers, although he admitted that he had made no such claim to the F.B.I. agents in telling his story earlier (R. 76a-78a). On cross-examination of the petitioner with reference to this question of authorization, some of his testimony before the grand jury was read to him for the purpose of refreshing his recollection. As to the matters thus brought out, petitioner frequently denied that his recollection was refreshed (e.g. R. 100a), but, as to each, testified explicitly that the answer he had given earlier before the grand jury was true (R. 107a, 108a, 113a).

At the close of the defendant's case, the trial court charged, *inter alia,* that (R. 130a-131a):

> This defendant, Klock, or any defendant, is not called upon to establish his innocence. The burden of proving his guilt rests on the prosecution throughout the case. He is entitled to the benefit of reasonable doubt on the whole case, on all the evidence, or lack of evidence, in this case, but if there be a reasonable doubt on any material question necessary for his conviction it must be resolved in his favor.
>
> Now, reasonable doubt is just what it says. It is not a mere whim, guess, or surmise, nor speculation, nor suspicion, nor can it be used as a mere subterfuge to avoid doing a disagreeable thing. It is such a doubt as reasonable men and women like yourselves may entertain after a careful and honest review and consideration of all the evidence in the case. It must be grounded in reason and must survive the test of reasoning or the mental process of a reasonable examination.
>
> The rule, of course, does not require that the guilt of the defendant should be established beyond all doubt, because in many instances that would be an impossibility. There is nothing, as you know, as well as myself, that can be said beyond all doubt. The law says only the defendant is entitled to a reasonable doubt, not all doubt. A reasonable doubt is such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called upon to give a reason. It is not an imaginary or unsubstantiated doubt. You must

> decide this case on the evidence presented in this courtroom and if the evidence establishes the guilt beyond a reasonable doubt and with certainty it is your duty to render a verdict of guilty against the defendant on both counts in the indictment.

At the end of the charge, the court asked defense counsel if he had any exceptions to the charge, to which he replied "I am quite content with your Honor's charge" (R. 134a); he was then asked if he had any requests to charge and he said that he did not. The jury returned a verdict of guilty (R. 139a); the court entered judgment and sentenced the petitioner to imprisonment for four years on each count, the sentences to run consecutively (R. 150a).

Thereafter, and while an appeal was pending to the Court of Appeals for the Second Circuit (cf. R. 151a, 142a-144a), the petitioner filed a motion for relief in the nature of a writ of error coram nobis, contending that the judgment of conviction should be vacated because the panels from which the grand jury which indicted him and the petit jury which convicted him were drawn were improperly constituted (R. 142a-144a). Specifically, he pointed out that the grand and petit juries at Syracuse, where the case was tried, were drawn solely from inhabitants of Onondaga County, New York, thus systematically excluding all inhabitants of the remaining 28 counties of the Northern District of New York.

The motion was denied (R. 149a).

The Court of Appeals affirmed the judgment of conviction (R. 130). Although the record does not show that there was an appeal from the denial of the coram nobis motion, the Court of Appeals, after passing the question whether the contention therein raised was timely, specifically rejected it (R. 130).

ARGUMENT

1. The petitioner's first contention now is his belated contention below that there was geographical discrimination in the selection of grand and petit jurors.

a. It is clear that this argument has no merit. For administrative reasons, resulting from the tremendous size of the Northern District of New York, the jurors who sit in Onondaga County are all drawn from that county. This surely does not result in an arbitrarily unrepresentative grand jury in the sense that that was true where people of a particular economic level or of a particular sex or race had been excluded. See *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217; *Ballard* v. *United States,* 329 U.S. 187. Petitioner has not shown, and could not show, that there is something peculiar to the 350,000 people in Onondaga County which sharply distinguishes them from the total population of the Northern District in any way likely to have any relevance to this case. *United States* v. *Gottfried,* 165 F. 2d 360, 363-365 (C. A. 2), certiorari denied, 333 U.S. 860, rehearing denied, *id.* 883. It certainly could not have been local prejudice that petitioner was concerned about, for

he explicity declined to have his case transferred from Syracuse to Albany for trial (R. 117).

b. It is clear that, whatever merit this argument has, it was made too late. Rule 6(b)(2) of the Federal Rules of Criminal Procedure provides that a motion to dismiss may be based on a challenge to the grand jury array. Rule 12(b)(2) of the Rules provides that defenses and objections "based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial." However this rule is construed, it would certainly not permit a challenge to the grand and petit jury arrays to be made six months after conviction.

2. Petitioner's second contention is that he was denied due process of law and the effective right to counsel because he was denied a continuance before the trial of the case "for a few days longer" (R. 2), and because he was denied an opportunity to inspect the grand jury minutes of his testimony and certain bank records in the custody of the Government.

As we have pointed out, the indictment was returned June 1, 1951 (R. 1a). On December 14, 1951, the petitioner was notified by the United States Attorney that his case would be tried in January, but was told that certain companion cases would be tried first. On January 7, 1952, one of the companion cases was called for trial, and because of the illness of one of the defendants in that

case, it could not be tried. It was determined then that since the issues were relatively simple in petitioner's case, and since a jury had been assembled, it should be tried first. The case was set for January 14.

Although petitioner claims that he had then to hire a trial counsel and wanted to make an investigation of certain documents, it is perfectly plain that there had been ample time to do these things earlier. Even assuming that petitioner intended to rely on counsel in the companion cases for purposes of trial, the need to devise a defense and to get the relevant facts for that purpose must have been obvious much earlier. The trial court's exercise of discretion to refuse a continuance under the circumstances hardly qualifies as a want of constitutional protection. Cf. *United States* v. *Foster,* 81 F. Supp. 281 (S. D. N. Y.); *Wallace* v. *United States,* 174 F. 2d 112 (C.A. 8), certiorari denied, 337 U.S. 947.

Petitioner contends that the charge of the trial court that a "reasonable doubt is such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called upon to give a reason" (R. 131a) deprived him of the trial by jury guaranteed by the Sixth Amendment (Pet. 13-16). He argues that this charge requires, in effect, that he be able to state his reason for doubt to the scrutiny of others, a standard which he claims imposes too great a burden on the defendant particularly in the context of a charge which elsewhere refers to the fact that the doubt must be "substan-

tiated" and that they should not use the rule of law given them as a "subterfuge" to avoid doing their duty (Pet. 14).

a. The petitioner's contention in this respect is unsound. The charge, as a whole, makes it clear that "reasonable doubt" was defined fairly to the petitioner, however true it may be that the charge was not an ideal one. We have quoted the most relevant portion of the charge above, pp. 6-7. Thus, it will be observed that the court emphasized the fact that the burden of proving innocence was not on the petitioner, but that of proving guilt rested on the prosecution "throughout the case"; that the petitioner was entitled to the benefit of reasonable doubt both on the whole case and on any material question; that reasonable doubt was not "mere whim, guess, or surmise, nor speculation, nor suspicion, nor * * * a mere subterfuge to avoid doing a disagreeable thing" but that it was a doubt which might be entertained after a careful and honest review of all the evidence in the case. And later, after using the language the petitioner particularly complains of, the court added that reasonable doubt was not "an imaginary or unsubstantiated doubt".

The short of the matter is that the court was using fairly standard language to state the substance of what many courts have stated before, that a reasonable doubt cannot be a merely fanciful one, that it must have some kind of roots in the evidence and in a rational evaluation of that evidence. Such an instruction was, of course, not erroneous. *Williams* v. *United States*, 208 F. 2d 447 (C.A. 5), cer-

tiorari denied, No. 565, O.T. 1953, March 15, 1954; *Freeman* v. *United States,* 158 F. 2d 891 (C.A. 9), certiorari denied, 331 U.S. 805; *United States* v. *Farina,* 184 F. 2d 18 (C.A. 2), certiorari denied, 340 U.S. 875.

There is no significant conflict on this point. The view adopted by the court below, that the reasonable doubt formula used here, although not the most desirable phrasing of the concept, does not justify reversal, is in accordance with its earlier decisions on the point, *United States* v. *Farina, supra; Marshall* v. *United States,* 197 Fed. 511, 512 (C.A. 2); *United States* v. *Woods,* 66 F. 2d 262, 265 (C.A. 2); and it is in harmony with the view of the Third Circuit, *Murphy* v. *United States,* 33 F. 2d 896 (C.A. 3), certiorari denied, 280 U.S. 584. The Ninth Circuit, which at one time took a different view, *Owens* v. *United States,* 130 Fed. 279, has for some time been in accord with the Second and Third Circuits. See, e.g., *Louie Ding* v. *United States,* 246 Fed. 80; *Freeman* v. *United States, supra.* Although there are contrary decisions in the Eighth Circuit, *Pettine* v. *Territory of New Mexico,* 201 Fed. 489, and *Ayer* v. *Territory of New Mexico,* 201 Fed. 497, it seems doubtful whether these decisions create a conflict. In the first place, it does not appear in those cases whether the total context of the charges mitigated the possibly overharsh effect of the instruction, as was true in the present case. And, in the second place, this supposed conflict has already been pressed on this Court without success at least three times before, over a long period of

time, in cases which, like the present, sustain the charge. *United States* v. *Farina,* 184 F. 2d 18 (C.A. 2), certiorari denied, 340 U.S. 875; *Murphy* v. *United States,* 33 F. 2d 896 (C.A. 3), certiorari denied, 280 U.S. 584; *Williams* v. *United States,* 208 F. 2d 447 (C.A. 5), certiorari denied, No. 565, O.T. 1953, March 15, 1954; see also *Freeman* v. *United States,* 158 F. 2d 891, 896 (C.A. 9), certiorari denied, 331 U.S. 805.

b. There is a second and equally conclusive answer to petitioner's "reasonable doubt" contention. No objection was made to the charge at the time it was given. Indeed, petitioner's counsel stated that he was "quite content with your Honor's charge" and declined to offer any requests to charge (R. 134a).

The error in the instruction, if there was any, is exactly the kind of error as to which Rule 30 of the Federal Rules of Criminal Procedure precludes objection on appeal where there has been no objection below. The Rule provides:

> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

This rule obviously contemplates that a defendant must make his objections when there is still time to act upon them and that he may not save them as a basis for obtaining a reversal in an appellate court.

The objection here relates to a matter which could easily have been cured if called to the attention of the court. It is at most an inartistic phrasing of an amorphous concept. Hence, it is clearly not such substantial error as to justify reversal in the absence of objection.

CONCLUSION

For the foregoing reasons, it is respecfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1954.

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